

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9 Springfield, Ohio

I.O.O.F. HOME OF OHIO, INC. 1/

Employer

and

JEANNIE MCCABE

Petitioner

and

GENERAL TEAMSTERS, SALES AND SERVICE AND
INDUSTRIAL UNION LOCAL NO. 654, AFFILIATED WITH
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
AFL-CIO 2/

Union

Case 9-RD-1869

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 3/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 4/

All licensed practical nurses of the Employer at its Springfield, Ohio facility, excluding non-LPN personnel, supervisors and guards as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by General Teamsters, Sales and Service and Industrial Union Local No. 654, affiliated with the International Brotherhood of Teamsters, AFL-CIO.

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Company**, 394 U.S. 759 (1969); **North Macon Health Care Facility**, 315 NLRB No. 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **October 26, 1998**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **November 2, 1998**.

Dated October 19, 1998

at Cincinnati, Ohio

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director, Region 9

1/ The name of the Employer appears as corrected at the hearing.

2/ The name of the Union appears as corrected at the hearing.

3/ The Employer, a corporation, is engaged in the operation of a nursing home in Springfield, Ohio. Following an election pursuant to a stipulation entered into between the Union and the Employer in Case 9-RC-16418, the Union was certified on September 2, 1994, as the collective-bargaining representative of the Employer's Licensed Practical Nurses (LPNs) working at its Springfield, Ohio facility, excluding non-LPN personnel, supervisors and guards as defined in the Act. Following the certification, and after several bargaining sessions, the Employer discontinued bargaining with the Union based on the Employer's contention that all the LPNs in the certified unit were supervisors within the meaning of the Act. In *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921 (1997), the Board found that the Employer was barred from challenging the validity of the Union's certification based on the alleged supervisory status of the LPNs because the Employer failed to raise that issue during the representation proceeding. The Employer was ordered by the Board to recognize the Union as the representative of the unit and to resume bargaining.

It appears from the record that the Employer and the Union resumed bargaining after the Board's order issued and reached agreement on some, but not all, terms of a collective-bargaining agreement. The record reflects that by letter dated September 16, 1997, the Employer transmitted a "last and best" offer to the Union for a new contract. Although there was apparently an additional telephone contact between the negotiators for the Employer and the Union, an agreement was apparently not reached and, therefore, by letter dated January 7, 1998, the Employer advised the Union that unless the Union accepted its "last and best" offer by January 14, 1998, the Employer would "impose the contract as last offered . . . effective February 8, 1998." Apparently there was another telephone contact between the negotiators which resulted in the Employer's negotiator, on January 20, 1998, transmitting to the Union's negotiator a letter along with what the Employer characterized as "a copy of the collective bargaining agreement which the [Employer] intends to impose with respect to its LPN employees effective February 8, 1998."

On January 23, 1998, the Union's secretary-treasurer, Roy L. Atha, sent the Employer a letter setting forth the names of the local union officers with whom the Employer should deal with respect to the Employer's employees represented by the Union. The letter includes the statement, "the above representatives have the right to enforce the Contract that has been negotiated for your employees by the Local Union." Although the Union relies on this correspondence in support of its contract-bar argument, it is clear that Atha did not view the imposed contract as having been agreed to by the Union. Thus, in subsequent correspondence of February 10 and 11, 1998, Atha quotes certain sections of the implemented offer, and refers to the "implemented contract" and the "unilaterally-imposed collective agreement." Moreover, the ill-fitting language of the January 23, 1998 letter to the circumstances involving the imposition of the contract terms in the instant situation may be explained by Atha's testimony that a similar letter is sent to all employers as a matter of course to advise employers which union officials have the authority to deal with those employers.

Following the February 8, 1998 implementation of the terms of the Employer's last offer, the Employer adhered to those terms and three or four grievances have been processed under the grievance provisions. However, neither of the parties ever signed the agreement.

The Union, contrary to the Employer and the Petitioner, contends that the implemented last offer of the Employer constitutes a "contract bar" to the instant proceeding. The core of the Board's discretionary contract bar doctrine is well established. Pursuant to this policy, a collective-bargaining agreement conforming to certain formal and substantive requirements will bar an election for a period of 3 years. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958); *General Cable Corp.*, 139 NLRB 1123 (1962). It is well settled, however, that the burden of proof rests on the party asserting that a contract bar exists. *Roosevelt Memorial Park*, 187 NLRB 517 (1970); *The German School of Washington, D.C.*, 260 NLRB 1250, 1256 (1982). Accordingly, the burden of proving the existence of a contract bar here rests with the Union. Based on all the evidence, I conclude that the Union has not sustained its burden. Initially, the Union has not established that any collective-bargaining *agreement* actually exists; and, secondly, the Union has failed to establish that the substantive requirement of *Appalachian Shale*, that a contract to serve as a bar must be signed has been met.

In *Seton Medical Center*, 317 NLRB 87 (1995), the Board held, "The single indispensable thread running through the Board's decisions on contract bar is that the documents relied on as manifesting the parties' agreement must clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to *an offer and an acceptance* of those terms through the parties, affixing their signatures." [Emphasis added.] Citing *USM Corp.*, 256 NLRB 986 (1981). Here, the Employer extended an offer which the Union was given a certain time limit to accept or the terms of that offer would be implemented. The record demonstrates that the Union did not accept the offer. Rather, the Union, at most, merely acknowledged that the terms implemented were those under which it would be forced to operate and attempted to hold the Employer to them. The fact that the Union had not agreed to these terms was emphasized by the Union's referring to them as the "implemented contract" and the "unilaterally-imposed collective agreement."

Secondly, assuming it could be argued that the parties had reached agreement on the terms of a collective-bargaining contract, it is clear that the agreement was never signed. A primary requirement mandated by *Appalachian Shale* and its progeny for a contract to constitute a bar is that the contract be signed by the parties. *Appalachian Shale*, supra at 1162. Thus, in *De Paul Adult Care Communities, Inc.*, 325 NLRB No. 132 (1998), where it appeared that the parties reached an agreement but there was no document, or documents, signed by both of the parties memorializing the agreement, such agreement was found not to bar a decertification petition. In *De Paul*, the union sent the employer a letter embodying the parties' agreement and relating that it would be presented to the union's membership for their approval. The union also asserted that the employer's negotiator, in a subsequent telephone conversation, confirmed that the contents of the letter accurately reflected the parties' agreement. The employer never, however, signed any document containing the final contractual provisions.

The Union cites *Georgia Purchasing, Inc.*, 230 NLRB 1174 (1977), as an example where an exchange of correspondence was found to have met the requirement for a signed contract so

as to bar a decertification petition. Indeed, in *De Paul Adult Care Communities*, supra, the Board acknowledged that to act as a bar, an agreement need not be embodied in a formal document, but that an informal document or series of documents, such as a written proposal and written acceptance which nonetheless contain substantial terms and conditions of employment, are sufficient to serve as a bar if signed -- but these documents must be signed by *both* parties. Here, the Union never accepted the Employer's proposal in writing but merely sent a letter to the Employer belatedly advising the Employer who would service the "contract" -- incorporating no terms to which the Union assented.

The Union also notes that the parties have been dealing with each other under the implemented "terms of the February 7, 1998 collective bargaining agreement" for some time. However, the fact that the parties have been living under the terms of an imposed agreement does not satisfy the requirement of a signed acceptance. In *De Paul*, supra at slip op. 2, the Board noted that "in *Appalachian Shale*, the Board specifically held that such unsigned contracts would not bar a petition, even though the parties consider it properly concluded and they put into effect some or all of its provisions."

Based on the foregoing, the entire record, and having carefully considered the arguments raised by the parties at the hearing and in their briefs, I conclude that the Union has not sustained its burden of establishing that there is a contract bar to these proceedings. Accordingly, I find that the petition raises a question concerning representation among the Employer's LPNs.

4/ The Employer, as previously noted, operates a nursing facility at which the Union has been the certified bargaining agent for the Employer's eight LPNs. There is no dispute that those employees eligible to vote consist of the Employer's LPNs at its Springfield, Ohio facility. The parties are in disagreement over the unit placement of one LPN classified as the Inservice Coordinator/Educator. This position is occupied by Theresa Ellison whom the Union, contrary to the Employer, would exclude from the Unit as a supervisor within the meaning of Section 2(11) of the Act. The Petitioner's position on the supervisory status of Ellison is not clear from the record.

Ellison is an LPN. Her duties as inservice coordinator/educator are summarized in her job description as being "to plan, organize, develop, and direct all in-service educational programs throughout the facility in accordance with current applicable federal, state, and local standards, guidelines and regulations, and as may be directed by the director of nursing, to assure that the highest degree of quality resident care can be maintained at all times." In this capacity, Ellison conducts inservice training for LPNs, State Tested Nursing Assistants (STNAs) and Certified Nursing Assistants (CNAs). Ellison audits the work of assistants, but other LPNs also may be called upon to perform this function. Ellison has an office in the Employer's training room.

In addition to her training duties, under the direction of Director of Nursing Sarah Hall, Ellison is responsible for formulating the schedules for nursing personnel, including the assistants. Moreover, Ellison performs work on occasion as one of the LPNs assigned to the wings of the Employer's facility where the residents' rooms are located. In these circumstances, however, Ellison merely has the same authority over nursing assistants as other LPNs.

Section 2(11) of the Act defines a supervisor as a person:

... having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. . . .

It must be noted, however, that in enacting Section 2(11) of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). See also, *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 280-281, 283 (1974). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985); *Chicago Metallic Corp.*, supra; *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Moreover, it is well established that the burden of proving that an individual is a supervisor rests on the party asserting supervisory status. See, *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491 (1993); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). “Accordingly, whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Here, there is no indication in the record that Ellison has any involvement with the suspension, layoff, recall, promotion, discharge, reward or discipline of other employees or in the adjustment of their grievances. What little authority Ellison has to direct or assign nursing assistants, such as being able to instruct them to work temporarily in another wing to equalize resident coverage, is the same authority as exercised by all the other LPNs and is not the type of authority which confers supervisory status. See, e.g., *Washington Nursing Home, Inc.* 321 NLRB 366, 378 (1996)

With respect to Ellison’s involvement in the hiring process, DON Hall will often use Ellison to interview prospective nursing assistants. However, Ellison’s role is limited to giving her opinion of the applicant to Hall. Hall makes the decision as to whether to hire and, in Ellison’s view, Hall does not usually follow Ellison’s recommendations. Mere participation in the hiring process, including sharing opinions with the hiring authority, does not establish the authority to effectively recommend hire as contemplated by Section 2(11) of the Act. See, e.g., *North General Hospital*, 314 NLRB 14, 16 (1994).

DON Hall relies on Ellison to compile work schedules for the LPNs and nursing assistants. This function is performed under the direction and oversight of Hall and appears to be clearly a

routine and clerical function. Hall diagrams for Ellison what coverage is needed. Both LPNs and nursing assistants permanently bid their shifts. Schedules are posted and nurses may volunteer for available shifts. If there are open slots on the LPN schedule, Ellison faxes a copy of the schedule to one of the agencies which is under contract with the Employer to supply nurses. The agency then advises which nurse will fill the slot. Ellison may advise Hall when Ellison is aware that the Employer has had trouble with the nurse the agency intends to send, but it is Hall's responsibility to determine if the nurse will be accepted. With respect to unfilled slots on the nursing assistants' schedule, it is somewhat less clear from the record but it appears that Ellison utilizes agency pool nurses assistants to fill the slots. Although Ellison may call the pool to attempt to arrange coverage if a shift is not adequately covered, all LPNs have this authority. It appears that the impression may be given to other employees that Ellison has more authority than she actually possesses with respect to scheduling, because Hall utilizes Ellison to convey certain scheduling issues to and from employees. It is clear from the record, however, that the control over such matters clearly rests with Hall.

Based on the foregoing, the entire record, and after careful consideration of the arguments made by the parties at the hearing and in their briefs, I conclude that the Union has not sustained its burden of establishing that Theresa Ellison is a supervisor within the meaning of the Act. Accordingly, I shall include Ellison in the Unit.

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